United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 30, 2010

TO : James Small, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: USC University Hospital
Case 21-CA-38999 512-5036-6717
601-5050-1500

This case was previously submitted for advice as to whether the Employer violated Section 8(a)(1) by informing employees that they could lose their jobs unless they withdrew their revocations of dues checkoff authorization. We concluded that the conduct violated the Act.

The Region resubmitted this case for advice as to whether the Employer can be held liable as a Golden State[1] successor where the predecessor employer committed the alleged unlawful conduct and was not charged within the Section 10(b) period. We conclude that the Region should dismiss this charge, absent withdrawal, because the Employer can have no remedial obligation where neither it nor its predecessor can be charged with liability for these unfair labor practices.

FACTS

At all times prior to April 1, 2009,[2] Tenet Healthcare Corporation (Tenet) owned and operated USC University Hospital. On April 1, USC University (the Employer) purchased the hospital from Tenet.

The facts of the underlying case are discussed in detail in the prior memorandum.[3] In 2004, approximately 500 of Tenet's service, technical, and professional employees chose to be represented by SEIU Local 399 which eventually became SEIU-United Health Workers (the Union). In or around February 2009, as a result of the recent dispute between the Union and the new National Union of Healthcare

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[1] Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973).

[2] All dates hereinafter are in 2009, unless otherwise noted.

[3] USC University Hospital, Case 21-CA-38999, Advice Memorandum dated December 10, 2009.

Workers (NUHW), about half of the unit aligned themselves with NUHW and submitted forms to Tenet's Human Resources department revoking their dues checkoff authorizations that they had previously signed for the Union. In the middle of March 2009, Tenet's Human Resources department began contacting employees and instructing them to pick up their revocation forms or risk termination. The Region recently informed us that there is no evidence that this conduct occurred beyond the end of March.

After April 1, the Employer took over operation of the hospital and continued to provide the same services to the same customers. The employees continued to perform the same work under the same supervisors. Additionally, the Human Resources Manager and other Human Resources staff members involved in the conduct mentioned above continued to be employed by the Employer in the same positions they previously held under Tenet. The Human Resources Director did not stay at the hospital.

Although there is no evidence of any formal recognition of the Union or adoption of the Tenet-Union collective-bargaining agreement by the Employer, the Employer has abided by the agreement and has not contested the Union's status as the exclusive bargaining representative.

This charge was filed on September 10. The Employer's Human Resources Manager, who had been employed in the same capacity under Tenet, received a copy of the charge. On October 1, the Region sent a letter to the Employer specifically stating that it was investigating allegations that Human Resources representatives threatened employees with termination in mid-March regarding their dues checkoff revocation forms. The Employer did not inform the Region at that time that it had not yet purchased the hospital in mid-March, when the threats allegedly occurred. Instead, the Employer denied the threats and outlined a list of talking points that "its" Human Resources employees followed when they contacted bargaining unit employees about their revocation forms.

The Region submitted the case to Advice because it involved the conflict between the Union and NUHW. On December 10, Advice authorized the Region to issue complaint alleging that the Employer violated Section 8(a)(1) of the Act. When the Region informed the Employer that complaint was authorized, the Employer stated for the first time that the alleged unlawful conduct occurred prior to its purchase of the hospital.

Tenet itself has not been charged with this conduct and it is now outside the 10(b) period.

ACTION

We conclude that, since the Employer did not violate the Act and cannot be liable as a Golden State successor for the offending predecessor employer's remedial obligations as the predecessor was not charged within the 10(b) period, the Employer cannot be held liable for any remedial obligation. The Region should therefore dismiss the charge, absent settlement.

Given the Region's conclusion that the alleged violations did not occur while the Employer operated the hospital, the only basis for holding the Employer liable would be to establish that it was a Golden State successor.[4] In Golden State, the Supreme Court approved the Board's Perma Vinyl[5] holding that a successor employer that acquires and operates a business in an unchanged form, with knowledge of facts surrounding a predecessor's unfair labor practice, can be liable for the predecessor's remedial obligations.[6] Golden State successorship is a remedial principle and as such, it is only invoked after an unfair labor practice is found and needs to be remedied.[7] Thus, there must be an outstanding charge against Tenet alleging it violated the Act before the Employer can be held responsible for remedying Tenet's unfair labor practices.

Tenet cannot be charged with committing the unfair labor practices at issue here. The alleged unlawful conduct occurred in March 2009, more than six months ago and outside the Section 10(b) period. Therefore, the Union is barred from filing a new charge against Tenet. Neither can Tenet be charged by amending the current charge to allege it as an employer. Amendments to add an employer to an unfair labor practice charge may be made outside the

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[4] The Employer does not dispute that it is a bona fide successor under NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972).

[5] Perma Vinyl Corp., 164 NLRB 968 (1967), enfd. sub nom., United States Pipe and Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968).

[6] Golden State, 414 U.S. at 171-72; Perma Vinyl, 164 NLRB at 969.

[7] Golden State, 441 U.S. at 184-185.

10(b) period as long as there is no prejudice.[8] The Board will look to whether the amended employer had notice of the charge and whether the facts and legal issues are similar.[9] Here, there is no evidence that indicates Tenet had notice of the original charge filed against the Employer. The charge was mailed to the Employer's Human Resources Manager at the hospital. While the manager was once an agent of Tenet, she became an agent of the Employer after it purchased the hospital. Therefore, when the manager received the charge in September, she was an agent of the Employer, not Tenet. There is no evidence that any agent of Tenet saw the original charge or knew of its existence. Thus, the charge cannot be amended to allege Tenet as an employer because it was not on notice of the allegations against it.

This case is distinguishable from other cases where the Board allows an additional employer to be amended to the charge even after the 10(b) period is over.[10] For example, in Specialty Envelope, the General Counsel originally alleged that a receiver was an agent of an offending company.[11] At the hearing, the administrative law judge allowed the General Counsel to amend the complaint to allege, in the alternative, that the receiver was a separate employer.[12] The Board found that the receiver could be added as an additional employer even though the 10(b) period had expired because the receiver was "on notice from the inception of the case" that his conduct was at issue in the case.[13] Here, Tenet had no such notice and therefore the charge cannot be amended to include it.

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[8] See Specialty Envelope Co., 313 NLRB 94, 94 (1993) enfd. in relevant part sub nom., Peters v. NLRB, 153 F.3d 289 (6th Cir. 1998), citing American Geriatric Enterprises, 235 NLRB 1532, 1534-1536 (1978).

[9] Specialty Envelope, 313 NLRB at 94.

[10] See, e.g., Specialty Envelope, 313 NLRB at 94; American Geriatric Enterprises, 235 NLRB at 1536; C.T. Taylor Co., 342 NLRB 997, 1000 (2004).

[11] 313 NLRB at 94.

[12] Ibid.

[13] Ibid. See also American Geriatric Enterprises, 235 NLRB at 1536 (amended employer on notice of the allegations against it because it received the original charge in the mail; the charge named the amended employer, correctly

Because the charge cannot be amended to allege Tenet as an employer, there can be no finding that its conduct violated the Act. Without a finding that Tenet violated the Act, we cannot charge the Employer as a Golden State successor to remedy Tenet's alleged unfair labor practices. Therefore, we conclude that the charge should be dismissed, absent withdrawal, because the Employer did not engage in any unlawful conduct and cannot be held liable as a Golden State successor.

B.J.K.

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identified it as a nursing home, and was filed by an employee of the amended employer).